STATE OF MICHIGAN

COURT OF APPEALS

DERIC EVANS,

Plaintiff-Appellant,

v

REGINALD PETERS and CEDRIC HARRIS,

Defendants-Appellees.

UNPUBLISHED
November 6, 2001

No. 222874
Wayne Circuit Court
LC No. 98-646755-NO

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Following a jury trial, the trial court entered a judgment on the verdict of no cause of action in plaintiff's suit against Detroit Police Officers Reginald Peters and Cedric Harris. Plaintiff appeals that judgment as of right and also challenges the court's denial of his motion for new trial. We affirm.

Plaintiff first argues that the court abused its discretion in refusing to expand the voir dire in this case. Specifically, plaintiff asserts that the court abused its discretion by refusing to sequester potential jurors and by refusing to ask specific questions posed by plaintiff, in light of the fact that several jurors indicated that they had friends or relatives who were police officers.

MCR 2.511(C) provides that the trial court may conduct the voir dire examination of prospective jurors. *Harrison v Grand Trunk Western Railroad Co*, 162 Mich App 464, 471; 413 NW2d 429 (1987). The purpose of voir dire is to give counsel the opportunity to obtain sufficient information upon which to develop a rational basis for exercising both challenges for cause and peremptory challenges. *White v City of Vassar*, 157 Mich App 282, 289; 403 NW2d 124 (1987)*; People v Furman*, 158 Mich App 302, 322; 404 NW2d 246 (1987). The scope of voir dire is within the discretion of the trial judge and his decision will be set aside only where there is an abuse of that discretion. *White, supra.*

First, although plaintiff claims that the court's statements indicated that it believed that it had asked the questions plaintiff requested, the record indicates that the court simply stated that the issues posed by plaintiff's questions had been "covered." Our review of the record shows that the scope of the court's questions encompassed the questions plaintiff requested. Plaintiff was not entitled to have any particular questions asked and phrased exactly as he requested. *Krzysiak v Hinton*, 104 Mich App 134, 140; 304 NW2d 823 (1981).

Further, plaintiff offers no evidence to support his assertion that the jurors felt intimidated or were otherwise "tainted" by being questioned in a group as opposed to individually, or that they were not truthful in their responses during voir dire. The "initial presumption is that [potential jurors] are honoring their oath and are being truthful." *People v King*, 215 Mich App 301, 303; 544 NW2d 765 (1996), quoting *People v DeLisle*, 202 Mich App 658, 663; 509 NW2d 885 (1993). "[A] juror's expressed lack of prejudice and ability to render an impartial verdict are all that is required to uphold selection of the juror." *People v Hughes*, 85 Mich App 8, 18; 270 NW2d 692 (1978). Here, none of the potential jurors who indicated they had relationships with police officers even hesitated in stating that those relationships would not affect their ability to fairly judge this case based on the evidence, despite repeated questioning on the subject by the court. Plaintiff offers no evidence to rebut the presumption that they were being truthful. *King, supra.* Further, although plaintiff suggests that the court did not spend sufficient time conducting voir dire, our review of the record shows that the voir dire conducted in this case gave plaintiff sufficient information to rationally exercise his challenges. *White, supra.* We conclude, therefore, that the court did not abuse its discretion by denying plaintiff's specific requests with regard to voir dire.

Next, plaintiff argues that the trial court committed error warranting reversal by instructing the jury that mere negligence was not sufficient to establish plaintiff's constitutional claims under 42 USC 1983. Plaintiff concedes that the instruction at issue is a correct statement of law, but contends it was not applicable because this case involved an intentional tort, and the word "negligence" was never used at trial. Plaintiff further contends that the court compounded the error by failing to define "negligence" for the jury.

Claims of instructional error are reviewed de novo on appeal. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). We review jury instructions in their entirety to determine whether the theories of the parties and applicable law were adequately and fairly presented to the jury. *Cox v Flint Bd of Hospital Managers (On Remand)*, 243 Mich App 72, 83, 85; 620 NW2d 859 (2000). The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and nonargumentative. MCR 2.516(D)(4); *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 422; 493 NW2d 447 (1992). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case, supra.*

Our review of the record shows that the jury instructions, including the instruction on negligence, fairly and adequately presented the theories of the parties and the applicable law. Plaintiff's second amended complaint against defendants alleged, among other things, that defendants deprived him of his rights under the Fourth Amendment to the United States Constitution in violation of 42 USC 1983 by using excessive force in their efforts to arrest plaintiff, and that their actions were the cause of plaintiff's injuries. Evidence presented at trial showed that plaintiff suffered a broken leg as a result of a fall from the front porch of his mother's home. Defendants testified that plaintiff, along with defendants, fell off the porch during the struggle that ensued when they attempted to arrest and handcuff plaintiff. Plaintiff, on the other hand, testified that one of the officers "tackled" him off the porch and landed on top of him, and then the other officer jumped on top of them. While the word "negligence" may not

have been used at trial, defendants' theory of the case was that they did not cause plaintiff to fall by using excessive force and, therefore, did not violate his constitutional rights. In requesting the instruction at issue, defendants relied on *Daniels v Williams*, 474 US 327, 328; 106 S Ct 662; 88 L Ed 2d 662 (1986), where the United State Supreme Court held that "the Due Process Clause [of the Fourteenth Amendment] is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."

We conclude that the negligence instruction was applicable, as the evidence supported a finding that defendants negligently, rather than intentionally, caused plaintiff to fall off the porch along with them. Further, the negligence instruction the court gave was accurate, concise, understandable, conversational, unslanted, and nonargumentative. MCR 2.516(D)(4); *Mull, supra*.

Further, although plaintiff asserts on appeal that the court's failure to define negligence confused the jury, the record indicates that plaintiff did not request that the definition be given, despite the fact that he knew the negligence instruction would be given; neither did plaintiff object on this basis after the instruction was given. MCR 2.516(C) provides as follows:

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection . . . .

See also *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). Failure to timely and specifically object precludes appellate review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001).

We find no basis for plaintiff's assertion that the jury was confused by the instruction on negligence because it was not accompanied by a definition of that word. We note that the jury submitted questions to the court after beginning deliberations, specifically requesting the definitions of assault and battery. We conclude that if the jury had needed a definition for "negligence" or had been confused as plaintiff suggests, it would have asked for a definition. Thus, even if the court erred in failing to give the definition of negligence, such error did not result in manifest injustice.

Next, plaintiff argues that he is entitled to a new trial because defense counsel engaged in improper conduct by intentionally eliciting expert witness testimony from Lieutenant Barbieri despite the fact that Barbieri was listed only as a lay witness before trial, and notwithstanding the court's rulings sustaining plaintiff's objections. Plaintiff also asserts that he was unfairly prejudiced by defense counsel's comment in closing argument regarding plaintiff's failure to offer expert testimony.

An attorney's comments usually will not require reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Ellsworth v Hotel Corp*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999). In

other words, a new trial may be warranted if misconduct occurred and that misconduct "may have caused the result or played too large a part and may have denied a party a fair trial." *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 466; 624 NW2d 427 (2000), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).

Here, to the extent that any misconduct is evident, plaintiff has not shown that defense counsel's conduct denied plaintiff a fair trial.

> [T]he Michigan Rules of Evidence provide that a lay witness must have "personal knowledge of the matter" to which he testifies and evidence to prove personal knowledge may consist of the testimony of the witness himself, MRE 602, and any opinion or inference must be "rationally based on the perception of the witness and * * * helpful to a clear understanding of his testimony or the determination of a fact in issue". MRE 701. [*Grand Rapids v HR Terryberry Co*, 122 Mich App 750, 753; 333 NW2d 123 (1983).]

Our review of the record shows that Barbieri was permitted to testify only with regard to matters within his personal knowledge, including practice and procedure of the Detroit Police Department. The trial court sustained plaintiff's objections to defense counsel's questions regarding the adequacy of the police reports concerning the incident at issue and whether an appropriate amount of force was used during plaintiff's arrests, because Barbieri was not present during the incident. Thus, although defense counsel may have attempted to elicit expert testimony from Barbieri, he was not allowed to do so.

Furthermore, we note that when defense counsel questioned Barbieri regarding police policy on court appearances, it was in order to rebut plaintiff's allegations that defendants intentionally failed to appear at a hearing on plaintiff's disorderly conduct charges. The court did not allow Barbieri to testify in response to questions regarding whether defendants were ever disciplined for allegedly failing to appear for a court date. Therefore, plaintiff was not prejudiced by defense counsel's questions on this subject. We also reject plaintiff's contention that he was prejudiced because he was forced to object repeatedly to inappropriate questioning by defense counsel. We note that the court sustained most of plaintiff's objections, and the court instructed the jury that they were not to hold the attorneys' objections against them. As a general rule, juries are presumed to understand and follow the court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

Plaintiff's final concern is with defense counsel's comment in closing argument that plaintiff could have called an expert but never did. Although this comment may have been inappropriate, it does not, as plaintiff contends, reflect a "studied purpose" to prejudice the jury. *Kern v St Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978). Moreover, the court gave the jurors an immediate instruction regarding defense counsel's reference to "what experts would testify to," telling them to disregard it as speculation. Again, we presume that the jury understood and followed the court's instructions. *Bordeaux, supra.*

Because defense counsel's conduct did not indicate a deliberate course of conduct aimed

at preventing a fair and impartial trial and any misconduct did not have a controlling influence on the verdict, reversal is not warranted. *Ellsworth, supra.*

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen